Supreme Court of the United States

OCTOBER TERM, 1945

No. 484

HELEN C. POFF, as Executrix of the Last Will and Testament of John B. Welshans, Deceased,

Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONER

MORRIS A. WAINGER,
Counsel for Petitioner.

SUBJECT INDEX

CASES CITED

STATUTE CITED

OTHER AUTHORITY CITED

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ARGUMENT

Neither the statute nor the authorities cited by respondent justify its claim that recovery is limited only to the next of kin, the nearest surviving relatives, if dependent.

Respondent's argument resolves itself to the proposition that when Congress provided that recovery (if there be no widow or husband and children or parents) should be for the "next of kin dependent upon such employee", it intended to provide only for the nearest surviving relatives, if dependent, as though Congress had said that recovery was to be only for the "next of kin, *if* dependent upon such employee". This was the conclusion of the Circuit Court of Appeals. To support this narrow and illiberal construction, respondent cites several cases in which it was held that resort should be had to the appropriate State statute of descent and distribution to determine who are "next

of kin". In these cases, the question to be determined was whether the person claiming was "kin" at all. That was the situation in *Seaboard Air Line v. Kenney*, 240 U. S. 489 (Respondent's Brief, p. 3; Petitioner's Brief, p. 13), and *Hiser* v. *Davis*, 234 N. Y. 300, 305 (Respondent's Brief, pp. 3-4), where the question was whether an illegitimate child is "kin" at all within the terms "next of kin" and "children" as used in the Act. The situation was similar in *Blagge* v. *Balch*, 162 U. S. 439, 464, and *Buchanan* v. *Patterson*, 190 U. S 352, 362 (Respondent's Brief, p. 3), where awards for French spoliation claims were payable to "next of kin". In none of these cases was the question to be determined affected by dependence upon the deceased individual whose "next of kin" were entitled to recover. In the case at bar, the question of the identity of the "next of kin" or whether petitioner is "kin" at all is not involved. Therefore, cases which merely hold that who are kin or next of kin is to be determined according to the State statutes of descent and distribution are irrelevant to the question before this Court in the case at bar. Certainly they do not support the proposition that recovery for the benefit of the "next of kin dependent upon such employee" means that recovery may be had only for the "next of kin, *if* dependent upon such employee" and limits recovery to the nearest surviving relative, if dependent, rather than to the nearest surviving dependent relative.

It seems unreasonable to petitioner to conclude that Congress intended by the language adopted, without specific provision to that effect, to limit recovery to the nearest surviving relatives, the next of kin, and to deny recovery to a dependent relative upon survival of a nearer non-dependent relative, when by the accident of survival or the varying provisions of state law next of kin may be, respectively, brothers and sisters, uncles and aunts, grandparents, cousins, or persons of more remote degree of consanguinity. It would seem that if such a limitation were intended, Congress would specifically have designated the relatives to take after parents, e.g., brothers and sisters and descendants

of deceased brothers and sisters. Petitioner believes that Congress intended to grant the right to recover to the nearest relative who may be dependent, irrespective of the survival of nearer non-dependent relatives, when it imposed the qualification of dependence upon those following the first two classes without also imposing the express limitation applicable to the first two classes—that a more remote relative takes only if there be "none" of the nearer relatives.

Kelley's Case, 222 Mass. 538 (Respondent's Brief, p. 7), is contrary to the weight of authority of the cases cited in petitioner's brief (pp. 7-9). It did not involve the Federal Employers' Liability Act, but interpreted the Massachusetts workmen's compensation law. The court itself, in that case, in effect admitted that its interpretation did not carry out "the object of the statute" which was "to provide in place of the wages of the deceased employee the means of sustenance for his widow and other dependents" (p. 541). The court's interpretation has been criticized as being contrary to the legislative intent:

> "It must be said that it is inconceivable that the legislature had any such idea in mind in passing the statute" (L. R. A., 1917D, 159n).

Of course, no conclusion in favor of respondent should be drawn from *Lindgren* v. *U. S.*, 281 U. S. 38, in which recovery was denied to a nephew and niece who were not dependent, merely because, as respondent states, "there was no suggestion that their non-dependency would serve to qualify a more distant relative who might be dependent" (Respondent's Brief, p. 5). Neither existence of a more distant dependent relative nor the rights of such a relative were involved in that case.

An intent of Congress contrary to petitioner's claim is not indicated by the fact that some statutes make provision for recovery by "dependent relatives". In the Federal Employers' Liability Act, Congress enacted a system of priorities by providing for recovery exclusively by the nearest relative who qualifies by reason of pecuniary loss or dependence. In the Death on the High Seas Act, 46 U. S. C. 761, 762 (Respondent's Brief, p. 6), Congress provided

an entirely different scheme: that all dependent relatives (kin) are entitled to recover in one action. Under that Act, a widow, children, parents and a cousin could all recover damages in the same action, and the recovery "shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person * * *" (46 U. S. C., § 762). The intent of Congress was different under the respective statutes. Inclusion of all relatives in one statute is not evidence of exclusion of the nearest dependent relative in the other.

Respondent's argument based on the existence of the more liberal statute is similar to the conclusion of the Circuit Court of Appeals that, because a dependent relative may be excluded under the Act upon the vesting of the cause of action in a prior qualified beneficiary entitled to only a small amount, it must be assumed that Congress never intended to provide for a more remote dependent relative when a closer non-dependent relative who is not entitled to recover also survives. Petitioner urges that just as the existence of a more liberal statute is not proof of the restriction urged by respondent here, so the fact that under conceivable conditions certain provisions of the law fail to afford desirable protection is no justification for an interpretation of another and different provision of the law to deny recovery merely to make it consistently harsh, when the language of the statute does not specifically require such interpretation.

Respectfully submitted,

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Counsel for Petitioner.

January 8, 1946.